No. 12774, No. 12791, No. 12792, No. 12793,
No. 12798, No. 12799, No. 12800, and No. 12802

UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT

OREGON-WASHINGTON PLYWOOD COMPANY, *Petitioner*,
vs. FEDERAL TRADE COMMISSION, *Respondent*. No. 12774

WHEELER, OSGOOD CO., *Petitioner*,
vs. FEDERAL TRADE COMMISSION, *Respondent*. No. 12791

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M. AND M. WOOD WORKING COMPANY, *Petitioner*,
vs. FEDERAL TRADE COMMISSION, *Respondent*. No. 12802

PETITIONS TO SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION

BRIEF OF PETITIONERS: Douglas Fir Plywood Association, Douglas Fir Plywood Information Bureau, Anacortes Veneer, Inc., Associated Plywood Mills, Inc., Elliott Bay Mill Company, Harbor Plywood Corporation, United States Plywood Corporation, Vancouver Plywood & Veneer, Inc., Robinson Plywood and Timber Company, Weyerhaeuser Sales Company, Wallace E. Difford

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JURISDICTION

A. Introductory

In this Court, petitioners are asking the Court to review and set aside a Cease and Desist Order, issued by the Federal Trade Commission.

B. The Pleadings

On March 1, 1948, the Respondent Federal Trade Commission issued a complaint against the respondents

named therein, (including the petitioners in this case) alleging certain unlawful activities which constituted unfair methods of competition in interstate commerce within the purview of Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45 (R. 5-26). On May 19, 1949, the Federal Trade Commission issued its amended complaint against the respondents named therein, (including the petitioners in this case) alleging certain unlawful activities as constituting unfair methods of competition in commerce (R. 35-59).

These petitioners filed answers to the amended complaint, admitting certain allegations of the complaint for a limited period of time, waiving intervening procedure and further hearing, but reserving the right to the filing of briefs and oral argument before the Federal Trade Commission (R. 59, 81, 63, 64, 66, 74, 75, 82, 85, 87).

On October 20, 1950, Respondent made its report in writing stating its Findings of Fact (R. 96-122) and issued its Order to Cease and Desist from doing certain things as set forth in said Order. This Order was directed to the parties named therein, including the petitioners in this case (R. 122-128).

Within sixty (60) days after service upon them of the Order to Cease and Desist, these petitioners filed in this court their Petition to Review and Set Aside the Order of the Respondent Federal Trade Commission (R. 162). All of these petitioners either carry on business or reside within the Ninth Circuit (R. 162-164).

Thereafter, said petition was served upon Respond-

ent, and the Respondent Federal Trade Commission certified and filed in this court a transcript of the proceedings before it (R. 139).

C. The Statutes

This Court has jurisdiction under the provisions of 15 U.S.C.A., § 45(c) which reads as follows:

(Review of order; rehearing)

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and procedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to

competitors pendente lite. * * *." (15 U.S.C.A. §45(c))

STATEMENT OF THE CASE

On March 1, 1948, respondent Federal Trade Commission issued its original complaint against a number of respondents, including the petitioners herein (R. 7-26).

On May 19, 1949, respondent issued its amended complaint against a number of respondents, including these petitioners. Certain concerted unlawful activities were alleged, constituting unfair methods of competition in interstate commerce (R. 35-59).

Since these petitioners are not attacking the form of the Cease and Desist Order, but as to it, are raising a question of law that no order of any kind should have been entered, we will not go into details in regard to the allegations of the amended complaint. It alleged that the parties named therein had jointly engaged in certain unlawful activities "since prior to January, 1936" down to the date of the complaint (R. 50-51, Paragraph Seven, Amended Complaint). These alleged illegal activities included curtailment of production, price fixing, use of basing points, etc. (R. 52-54).

To this amended complaint these petitioners filed answers, substantially identical and we quote one of them as typical.

> "Answer of Respondents Douglas Fir Plywood Association, and Douglas Fir Plywood Information Bureau, a Voluntary Organization, to Amended Complaint

"In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondents Douglas Fir Plywood Association and Douglas Fir Plywood Information Bureau, a voluntary organization, come by their attorneys McMicken, Rupp & Schweppe and Alfred J. Schweppe, and answering the amended complaint in this proceeding, state that they admit all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to-wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, deny all of the material allegations of fact set forth in the complaint, and waive all intervening procedure and further hearing as to the said facts.

"Any and all admissions of fact made by respondents herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs

before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

"Dated: June 8, 1949. [202]

McMicken, Rupp & Schweppe,

/s/ Alfred J. Schweppe,

Attorneys for Respondents Douglas Fir Plywood Association and Douglas Fir Plywood Information Bureau, a Voluntary Organization." (R. 59-61)

It will be noted that the answers limit the illegal activity "to a substantial part of the period of time charged in the amended complaint, to-wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise."

On August 24, 1949, there was submitted in the proceeding before the Federal Trade Commission "Request to Trial Examiner to Close the Record for the Reception of Testimony and Other Evidence" (R. 89-90) and on September 30, 1949, the Trial Examiner entered an "Order Closing Reception of Evidence and All Other Proceedings Before Trial Examiner" (R. 90-91).

Subsequent thereto Briefs were filed with the respondent Federal Trade Commission, and oral argument had, the petitioners herein contending that no Cease and Desist Order of any kind should be entered in said proceedings because of the long interval of time between the termination of the alleged wrongful practices some time between May, 1935, and August 1, 1941, and the initiation of the proceedings by the respondent on March 1, 1948.

On October 20, 1950, the Federal Trade Commission

entered its "Findings as to the Facts and Conclusions" (R. 96-122).

In view of the fact that, with one exception hereinafter noticed, the petitioners are not attacking the findings, they will not be discussed in detail. Generally speaking, they followed the allegations of the amended complaint as limited by the admissions contained in the answers. In Paragraph Seven of the Findings respondent Federal Trade Commission, pursuant to the answers, limited their findings as to illegal activity that it existed "* * * during a substantial part of the period of time between May, 1935, and August 1, 1941 * * *" (R. 109-110). Paragraph Nine of the findings, insofar as necessary to be stated for an understanding of the question raised as to it, reads as follows:

> "Paragraph Nine: The capacity, tendency and results of the aforesaid understanding, agreement, combination, conspiracy and planned common course of action, and the acts and things done thereunder and pursuant thereto, by the respondents, as hereinbefore set forth, have been *and now are*:
>
> "(a) To interfere with and curtail the production of plywood products and the sale of same in interstate commerce to dealers therein, etc." (Italics supplied) (R. 119)

Having made the findings of facts and conclusions, the respondent, on October 20, 1950, entered an order to cease and desist, decided against the parties named therein, including these petitioners (R. 122-128).

In view of the fact, as previously stated, that the petitioners are not attacking the form of the Cease and

Desist Order but are contending that no order of any kind should have been entered, no statement as to the contents of the order is considered necessary. These petitioners filed in this court "Petition to Review and Set Aside Order of Federal Trade Commission" (R. 162-175) contending that no Cease and Desist Order of any kind should have been entered due to the long lapse of time between August 1, 1941, the date of the cessation of illegal activity, and March 1, 1948, the date of the issuance of the complaint by the Federal Trade Commission, and also that the respondent was in error in concluding in Paragraph Nine of the findings of fact that the results of said understanding have been "and now are" to violate the Federal Trade Commission Act, having already found in Paragraph Seven of the findings that the alleged illegal conduct occurred for some time during a substantial part of the period of time between May, 1935, and August 1, 1941 (R. 168-169).

QUESTIONS INVOLVED

The questions involved which are raised in this court by the petition to review and set aside the order of the respondent are as follows:

(a) Should an order to cease and desist be issued, directed toward alleged illegal activity, when the Federal Trade Commission has made its findings based upon the record, that the illegal activity existed "during a substantial part of the period of time between May, 1935, and August 1, 1941," and a period of six years and eight months had elapsed from the time of the cessation of the illegal activity and the initiation

of the proceeding by the Federal Trade Commission by the filing of a complaint against the parties involved, and involving such illegal activity?

(b) When the Federal Trade Commission has made a finding of fact that illegal activity ended not later than August 1, 1941, is a finding justified that the capacity, tendency and result of said illegal activity *now is* to accomplish certain illegal acts?

Supplemental Statement of the Case on Behalf of Petitioner, Wallace E. Difford

There are some additional facts which need to be noted in connection with the petition of Wallace E. Difford, who is the only individual named in the Cease and Desist Order. Paragraph Five of the amended complaint alleges these facts in regard to him:

> "Respondent, Wallace E. Difford, is an individual who maintains his office in the Henry Building, Seattle, Washington. Said respondent was from March 8, 1938, to June 30, 1946, employed as managing director of respondent Association, and as such managing director initiated, supervised and carried out many of its policies, and has cooperated with said respondent Association, said respondent Bureau, said Member and Subscriber respondents, said respondent, Robinson Plywood and Timber Company, and with said Non-affiliate respondents in the hereinafter complained of activities. Said respondent Difford severed his employment with respondent Association as of June 30, 1946, and is presently engaged in the distribution of lumber products under the name of W. E. Difford & Sons." (R. 49)

The answer to the amended complaint filed by Wal-

lace E. Difford was substantially the same as the others and was the same as the one quoted above, except that his admission of illegal activity, in accordance with the terms of the answer, was for the period between March 8, 1938, and August 1, 1941 (R. 87-88).

Supplemental Question Involved in Regard to Petitioner, Wallace E. Difford

The same questions in regard to this petitioner are involved, as stated above, with this additional question: When the alleged illegal activity of an officer arises out of, and in connection with, his employment by a corporation, and when he left the employment of that corporation on June 30, 1946, to engage in a different business on his own behalf, should a Cease and Desist Order, entered more than four years after he left such corporation, and entered more than nine years after the cessation of the illegal activity complained of, be entered against such individual?

Specification of Errors Relied Upon

1. The respondent Federal Trade Commission was in error in entering any order to cease and desist. There was no finding, or pleading upon which to base such a finding, of any wrongful or illegal action subsequent to August 1, 1941, and due to the long lapse of time intervening between said date of August 1, 1941, and the initiation of proceedings by the respondent herein on March 1, 1948, and the entry of said order on October 20, 1950, no cease and desist order of any kind should have been issued.

2. The respondent Federal Trade Commission was in

error in concluding in Paragraph Nine of the Findings of Fact that the results of the said understanding have been *"and now are"* to violate the Federal Trade Commission Act in various particulars since the Commission had already found in Paragraph Seven of the Findings, the only finding that could be made on the record, namely, that the alleged illegal conduct occurred for some time during a substantial part of the period of time between May, 1935, and August 1, 1941.

3. As to petitioner, Wallace E. Difford, respondent Federal Trade Commission was, in addition to the matters set forth in Specification of Errors No. 1, also in error in entering an order to cease and desist, based upon alleged illegal activity of an officer of a corporation, when he terminated his employment with that corporation more than four years prior to the entry of the order, and engaged in a different business on his own behalf.

ARGUMENT

A. Summary.

1. *As to the finding.*

The evidence in the case having shown any illegal activity ending not later than August 1, 1941, and the respondent having made a finding of fact accordingly, a subsequent finding or a conclusion that the capacity, tendency and result of the illegal acts, which ceased not later than August 1, 1941, now are to accomplish certain illegal results, is not supported by any evidence and is erroneous.

2. *That no Cease and Desist Order should be entered.*

The record in the case, consisting of the amended

complaint and the answers, shows that any illegal activity on the part of any of these petitioners terminated not later than August 1, 1941, the Findings of Fact being in accord, and the original complaint having been filed by the respondent on March 1, 1948, an intervening lapse of time of six years and eight months, an order to cease and desist activities after so long a lapse of time is not warranted under the Federal Trade Commission Act (15 U.S.C.A. §45) and should be set aside by the court.

B. That part of the finding or conclusion in Paragraph Nine of the findings of fact and conclusions that the capacity, tendency and result of the illegal activity terminating not later than August 1, 1941, is now to accomplish certain illegal results is not supported by any evidence and cannot be the basis of an order to cease and desist.

We are well aware of the general rule that in this type of a proceeding the Court of Appeals will not pass upon the weight of the evidence and that the findings of the Federal Trade Commisison, supported by substantial evidence, are conclusive. We are also aware of the rule that all reasonable inferences of facts from the evidence are for the Federal Trade Commission to make. Many cases have laid down these rules, as for instance, *Allied Paper Mills v. Federal Trade Commission,* 7 Cir., 168 F.2d 600.

It is also the law, however, that a finding of the Federal Trade Commission, not supported by the evidence, will not sustain an order to cease and desist. *Federal Trade Commission v. Paramount Famous-*

Lasky Corporation, 2 Cir., 57 F.2d 152; *V. Vivaudou, Inc. v. Federal Trade Commission,* 2 Cir., 54 F.2d 273.

The amended complaint and the admission answers stand in the place of or constitute evidence taken. *Century Metalcraft Corporation v. Federal Trade Commission,* 7 Cir., 112 F.2d 443; *Hill v. Federal Trade Commission,* 5 Cir., 124 F.2d 104; *Kritzik v. Federal Trade Commission,* 7 Cir., 125 F.2d 351.

Consequently, the only evidence upon which a finding can be based shows that the illegal activity terminated not later than August 1, 1941. And, as a matter of fact, as has been shown in the Statement of the Case, the respondent in its findings in Paragraph Seven (R. 109-110) made the only finding of facts that could be made on the basis of the record, namely, that the illegal activity occurred "during a substantial part of the period of time between May, 1935, and August 1, 1941." On the basis of the record in this case before the respondent, and in view of the finding referred to in Paragraph Seven, there is absolutely nothing to support that part of the finding in Paragraph Nine (R. 119) that the "capacity, tendency and results" of the illegal activity "have been and now are" to accomplish certain illegal results. It may be, in view of the fact that the findings paralleled pretty closely the allegations of the amended complaint which contained language almost the same in its Paragraph Nine as appears in Paragraph Nine of the findings (R. 54), that the use of the words "and now are" was inadvertance in preparing the findings in this matter.

In concluding this branch of the Argument, we sub-

mit that the language to which we object is not even properly a finding of fact, but that in any event there is not the slightest evidence to support it, and consequently that that portion of the findings cannot be urged to sustain the validity of the order to cease and desist.

C. No Cease and Desist Order of Any Kind Should Have Been Entered

As has been previously stated, in the answers the admissions are limited to "a substantial part of the period of time charged in the amended complaint, to-wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise."

Since the amended complaint and the admission answers stand in the place of or constitute evidence taken (*Century Metalcraft Corporation v. Federal Trade Commision,* 7 Cir., 112 F.2d 443; *Hill v. Federal Trade Commission,* 5 Cir., 124 F.2d 104; *Kritzik v. Federal Trade Commission,* 7 Cir., 125 F.2d 351), the situation shown on the record then is this: Beginning May, 1935, and for a substantial part of the period thereafter, these respondents engaged in certain unlawful activities mentioned in the amended complaint. This unlawful conduct existed only for a substantial part of the period between May, 1935, and August 1, 1941. It existed only somewhere between those time limits "and not otherwise."

The Findings of Fact entered by the respondent are to the same effect that the illegal acts occurred "during a substantial part of the period of time between May, 1935, and August 1, 1941" (See paragraph Seven R. 109-110).

The wrongful acts began in May, 1935, some sixteen years ago. They ended not later than August 1, 1941, more than nine years prior to the entry of the Cease and Desist Order. Almost seven years elapsed before the filing of the original complaint in this proceeding.

We submit that the Commission was not authorized under these facts to issue its order. It is difficult for us to determine in what manner an order to cease and desist doing what you have not done for almost seven years prior to filing a complaint, is in "the interest of the public," within the meaning of the Federal Trade Commission Act.

> "The purpose of the statute is protection of the public, not punishment of a wrongdoer." *Gimbel Bros. v. Federal Trade Commission,* 2 Cir., 116 F.2d 578, 579.

The language of Commissioner Mason in *Grocery Distributors Association of Northern California, et al.,* F.T.C., No. 5177, C.C.H. Trade Regulation Service, Transfer Binder, Para. 13,729, is particularly apt in this case:

> "As one court has said, 'It is the object of the Federal Trade Commission to reach in their incipiency combinations which would lead to undesirable trade restraints.'
>
> "It seems we have tackled this problem at the tomb instead of at the womb."

The facts in this case are far stronger than those in the *Grocery Association* case just mentioned. There the acts complained of took place between January, 1938, and February, 1940, and the original complaint was issued June 8, 1944. The record was silent as to

any subsequent wrongful action. In that case only four years had elapsed between the termination of the alleged illegal acts and the issuance of the complaint. In this case nearly seven years had elapsed. The Commission dismissed the *Grocery Association* case.

There is not much authority on this question, and we can only assume that it is because cases of this nature, if they ever reach the stage where a complaint is filed, meet the fate which the *Grocery Association* case met at the hands of the Commission itself. There are, however, several cases directly in point:

> "Whether the method of sale first pursued by the company and then abandoned on the suggestion of the Commission was an unfair method of competition is a question which, in the circumstances, is more academic than real and therefore is one on which we do not feel called upon to express an opinion. It will be enough to say that the evidence shows that the company itself had ceased and desisted from the practice before the Commission filed the complaint, and on this evidence the order of the Commission to cease and desist from doing what the company had already ceased and desisted from doing—and what it offered to stipulate never to do again—cannot be sustained." *John C. Winston Co. v. Federal Trade Commission,* 3 Cir., 3 F.2d 961, at p. 962.

> "With reference to paragraphs 4 and 6, the practices described in these paragraphs which were admitted to have been carried on formerly by the respondent were demonstrated by uncontroverted evidence to have been discontinued in 1932. The misrepresentations as to the number of civil service employees, the nature of the positions avail-

able, etc., were made by respondent's salesmen, aided in their interviews by an inaccurate booklet. Respondent suppressed the booklet and warned the salesmen not to use the information. A misleading guaranty of refund which had been employed in respondent's contract form was actually interpreted as constituting the guaranty of a government job. This was altered, and these practices were discontinued by respondent prior to September 16, 1933, when the proceeding before the Commission was instituted. The Commisison is not authorized to issue a cease and desist order as to practices long discontinued and as to which there is no reason to apprehend renewal. L. B. Silver Co. v. Federal Trade Commission (C.C.A.) 292 Fed. 752; Cf. United States v. U.S. Steel Corp., 251 U.S. 417, 445, 40 S. Ct. 293, 64 L.Ed. 343, 8 A.L.R. 1121." *Federal Trade Commission v. Civil Service T. Bureau,* 6 Cir., 79 F.2d 113, at p. 115-116.

"The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all the facts which include the attitude of respondent toward the proceedings, the sincerity of its practices and professions, of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued.

"On the other hand, parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrongdoing obtained, occupy no position where they can demand a dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound

discretion to be exercised wisely by the Commission—when it comes to entering its order.

"The object of the proceeding is to stop the unfair practice. If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appropriate. We are not satisfied that the Commission abused that discretion in the instant case." *Eugene Dietzgen Co. v. Federal Trade Commission,* 7 Cir., 142 F.2d 321, at pp. 330-331.

It is true that in the last cited case the court upheld the entry of the cease and desist order but it should be noted that the illegal activity ceased one year *after* the complaint had been filed.

The same court which decided the *Dietzgen* case just referred to, very recently had this same problem again before it. After considering several of the cases on this point the court lays down this rule:

* * * "in determining whether the Commission has abused its discretion in ordering a petitioner to desist from an unfair practice which he has already halted, the court is concerned largely not with the period of time which has elapsed between the cessation and the entry of the order but with the time from the date of cessation to the date of issuance of the complaint." *Galter v. Federal Trade Commission,* 7 Cir., 186 F.2d 810, 813-814.

In the case just mentioned the court noted that under the record the practices had not been discontinued until more than a year *after* issuance of the complaint. In

our case upon the record the illegal practices ceased not later than August 1, 1941, six years and eight months—almost seven years—prior to the filing of the original complaint by the Federal Trade Commission. The rule laid down by the court in the *Galter* case is a reasonable one and we submit should be decisive in this case.

We are aware of the many cases which have made the broad general statement that discontinuance of the practices in question does not prevent the entry of a cease and desist order. All of those cases are clearly distinguishable on the facts of this case, and courts had in mind the peculiar factual situation involved therein. In those cases where the facts do appear in the opinion it will be observed that the respondent was insisting up to the time of the hearing that the Act was void or that in any event they had not violated it; or, abandonment of the practices did not occur until after the complaint was filed; or only part of the practices were discontinued. In some cases the discontinuance occurred only shortly before the complaint was filed.

For the convenience of the Court an analysis of those cases is appended to this brief as Exhibit "A."

We are in entire accord with the rule that a respondent who has ceased his illegal activities either shortly before or after the filing of the complaint is in no position to complain if a cease and desist order is entered against it. That is not this case.

The same rule applies in the field of injunctions and an injunction, of course, is analogous to a cease and desist order:

"An injunction restraining a defendant may be

granted only when a wrongful act is reasonably to be anticipated or there is a threat of such an act. An injunction relates to the future; it should not be issued against a defendant who was not violating the law, or threatening to violate it when the suit was commenced. *Industrial Assn. of San Francisco, et al. v. United States,* 268 U.S. 64, 45 S. Ct. 403, 69 L. Ed. 849; *United States v. U. S. Steel Corporation,* 251 U.S. 417, 444, 445, 40 S. Ct. 293, 64 L. Ed. 343, 8 A.L.R. 1121; *Standard Oil Co., et al v. United States,* 283 U.S. 163, 181, 51 S. Ct. 421, 75 L. Ed. 926; *United States v. E. I. Du Pont de Nemours & Co., et al.,* C.C. Del., 188 Fed. 127; *Fleming v. Phipps, D.C.,* 35 F. Supp. 627; *United States v. Aluminum Co. of America, et al.,* D.C., 44 F. Supp. 97, 215.

"An injunction may not be used to punish for what is past and out of existence. *Standard Oil Co. v. United States, supra; United States v. Aluminum Co. of America, supra.*" *United States v. William S. Gray & Co., et al.* (D.C. N.Y.) 59 F. Supp. 665, at p. 666.

Accord *United States v. Hart-Carter Company, et al.* (D.C. Minn.) 63 F. Supp. 982.

There is another angle to this case which shows so clearly that a cease and desist order was not appropriate here. Rule 26 of the Rules of Practice of the Federal Trade Commission requires that within sixty days after the service of the cease and desist order the respondent shall file with the Commission a report in writing "setting forth *in detail* the manner and form in which they have complied with said order" (Emphasis supplied).

Turning now to the cease and desist order and taking for example paragraph numbered 2 of the order—petitioners are ordered "to forthwith cease and desist from, etc., * * * 2. Restricting or curtailing the production of Douglas Fir Plywood;"—How can a party comply with this rule that he furnish a statement "in detail" showing how he has "forthwith" ceased as of 1950 to do something that he hasn't done since sometime between 1935 and the year 1941?

The very words "cease and desist" as used in the statute contemplate that the respondent will enter upon a course of conduct different from what he has currently or recently been doing.

> "The legislature used the word 'ceased' which imports that a change has taken place." *In re Simpson* (Cal. App.) 217 Pac. 789, 790.

We respectfully urge that the Court follow in this case the precedents above cited, all less cogent in their facts than this one, and set aside the Order to Cease and Desist entered by the respondent Federal Trade Commission.

D. Argument on behalf of Petitioner Wallace E. Difford.

This argument is in addition to and supplements the argument heretofore made.

Mr. Difford, of course, urges that, on the record, which shows no violation for almost seven years prior to filing of the complaint, no order at all should have been entered. However, he urges some additional matters specially applicable to him.

We direct the Court's attention to the fact that Mr.

Difford's connection with this matter arises solely from his previous employment as Managing Director of the petitioner Douglas Fir Plywood Association, and that he severed his employment with the Association on June 30, 1946, and is now engaged in business on his own behalf in the distribution of lumber products, under the name of W .E. Difford & Sons.

The illegal activity of Mr. Difford having terminated not later than August, 1941, and he having left the Association in June of 1946, long before the filing of the complaint, certainly there is no reason whatsoever why he should have been named in any cease or desist order issued by the respondent.

Mr. Difford now being engaged in lumber distribution wholly unrelated to the functions of the Plywood Association, which he formerly managed, there would be no reason to include him as an individual unless to punish him for illegal activity many years past, but, as we have pointed out previously, the purpose of the Federal Trade Commission Act is not to punish violators for past conduct.

> "Paragraph 40 is a general injunction against future conduct. It is designed to prevent combinations, in violation of the antitrust statutes. It names each corporate defendant 'and the individual defendants associated therewith' meaning the officers and directors of each who are found to have participated in the conspiracy. But an injunction binding the corporate defendants, their officers, agents and employes, is sufficient to constrain the individual defendants so long as they remain in official relation, and to bind their successors. *It is unnecessary to enjoin them personally, when that*

relation is severed." Hartford-Empire Co. v. United States, 323 U.S. 386, 428, 89 L.Ed. 322, 65 S. Ct. 373. (Italics supplied.)

The case of *United States v. William S. Gray & Co.* (D.C. N.Y.) 59 F. Supp. 665, is exactly in point in regard to Mr. Difford. If in the following quotation you substitute "Difford's" name for that of "Craver," substitute "Douglas Fir Plywood Association" for "Delta," substitute is "engaged in business on his own behalf" for "now employed as chemical engineer, etc.," and substitute "the manufacture and distribution of plywood" for "Methanol," you have almost precisely our situation. In that case, at page 666, the court said:

> " * * * It also appears that Craver was formerly resident manager of Delta's plant at Wells, Michigan, but has terminated his connection with Delta and is now employed as Chemical Engineer by the Chemical Construction Company of New York in New York City, and which has no connection with any business referred to in the complaint and has no intention of engaging in any Methanol business."
>
> * * * * * * * *
>
> "An injunction may not be used to punish for what is past and out of existence. *Standard Oil Co. v. United States, supra* [283 U.S. 163, 51 S.Ct. 421, 75 L.Ed. 926]; *United States v. Aluminum Co. of America, supra* [44 F. Supp. 97]."

CONCLUSION

In conclusion, petitioner Wallace E. Difford respectfully submits that for the reasons stated above, that in no event should the order to cease and desist run against

him individually, and all the petitioners urge that from the standpoint of the Federal Trade Commission Act and what it was supposed to accomplish, bearing in mind the long interval between the cessation of any illegal activity and the initiation of proceedings by the respondent, and under the authority of the cases above cited, this petition to set aside the order to cease and desist issued by the respondent should be granted.

Respectfully submitted,

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APPENDIX "A"

CASES HOLDING THAT DISCONTINUANCE OF ILLEGAL PRACTICES DOES NOT BAR THE ENTRY OF A CEASE AND DESIST ORDER.

The purpose of this appendix is to analyze the cases factually, particularly from the standpoint of how long the practices had been discontinued, and the motivating cause for the discontinuance. The first case to lay down the principle in question was *Sears, Roebuck & Co. v. Federal Trade Commission,* 7 Cir., 258 Fed. 307, 6 A.L.R. 358. The case has often been cited, but never with reference to the particular facts involved. The complaint was filed February 26, 1918. The practices apparently had been discontinued by August, 1917, and the answer stated that there was no intention of resuming them. The court noted, however, that the respondent was still contending that the Act was void for indefiniteness, that it was unconstitutional, and that in any event, the respondent had not violated it. The court concludes:

> "* * * So here, no assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course." (p. 310)

Discontinuance "several months before the complaint was filed." *Guarantee Veterinary Co. v. Federal Trade Commission,* 2 Cir., 285 Fed. 853.

Fox Film Corporation v. Federal Trade Commission, 2 Cir., 296 Fed. 353, the facts on this point not appearing; *Juvenile Shoe Company v. Federal Trade Commission,* 9 Cir., 289 Fed. 57, facts on this point not appearing.

Court could not determine whether the practices were

discontinued before the filing of the complaint. *Moir v. Federal Trade Commission,* 1 Cir., 12 F.2d 22.

> "It is contended that the objectionable publications ceased four years before the complaint issued, and there is no intention to renew them, therefore, there was no basis for the order as to such. It may be that the immediate inciting cause for the publications has vanished or is inactive. However, this is not of itself sufficient to vacate that part of the order although it might be reason for refusing, without prejudice, an application for the enforcement thereof at this time." *Chamber of Commerce v. Federal Trade Commission,* 8 Cir., 13 F.2d 673, at pp. 686-687.

Accord, *Arkansas Wholesale Grocers Ass'n. v. Federal Trade Commission,* 8 Cir., 18 F.2d 866, 871, the facts not covering this point. Circumstances of discontinuance not shown. *Lighthouse Rug Co. v Federal Trade Commission,* 7 Cir., 35 F.2d 163.

Discontinuance between the issuance of an original cease and desist order and the modified order involved in this case. *Federal Trade Commission v. Good-Grape Co.,* 6 Cir., 45 F.2d 70.

Cessation when the complaint was filed. *Federal Trade Commission v. Wallace,* 8 Cir., 75 F.2d 733.

Discontinuance of only *some* of the practices. *Armand Co. v. Federal Trade Commission,* 2 Cir., 78 F.2d 707.

Conditional discontinuance to be resumed if any competitor did so. *Fairyfoot Products Co. v. Federal Trade Commission,* 7 Cir., 80 F.2d 684.

Date of filing complaint was not shown but order

entered June 21, 1935. Practices discontinued August 1, 1934.

> " * * * Discontinuance or abandonment is no defense to the order, for, if true, it would be no guaranty that the challenged acts will not be renewed. *Federal Trade Commission v. Wallace* (C.C.A.) 75 F.(2d) 733. The benefit to respondents of an abandonment may be fully protected by their report to the Commissioner as required by the Commission's order." *Federal Trade Commission v. A. McLean & Son,* 7 Cir., 84 F.2d 910, at p. 913.

"*Some*" practices were abandoned and respondent was opposing the order on the merits. *Federal Trade Commission v. Standard Education Society,* 2 Cir., 86 F.2d 692. Point not mentioned on appeal, 302 U.S. 112, 58 S. Ct. 113, 82 L.ed. 141.

Respondent insisted it had the legal right to do the things complained of. *National Silver Co. v. Federal Trade Commission,* 2 Cir., 88 F.2d 425.

Report of compliance with previous cease and desist order, set aside by the Commission when an amended complaint was filed, does not bar issuance of cease and desist order under the amended complaint. *Bunte Bros. v. Federal Trade Commission,* 7 Cir., 104 F.2d 996.

In the following case the facts on this point do not appear as to how long the practices had been discontinued, nor the circumstances:

> " * * * Both findings and evidence, however, are to the effect that the petitioners had ceased to violate Sec. 5 of the Act in the respects forbidden before the complaint was filed. Because of this, it is argued that paragraphs two and three of the

order should be set aside. We do not understand that discontinuance of practices violative of the Act will alone deprive the Commission of power to make an order otherwise justified. The Act in express terms requires the Commission to issue a complaint if it shall appear to it that such a proceeding would be to the interest of the public whenever ' * * * any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce * * *.' 15 U.S.C.A. § 45(b). Past as well as present practices give the Commission cause for action and their discontinuance is no defense. *Federal Trade Comm. v. A. McLean & Sons,* 7 Cir., 84 F.2d 910, 913; *Federal Trade Comm. v. Wallace,* 8 Cir., 75 F.2d 733, 738." *Educators Ass'n. v. Federal Trade Commission,* 2 Cir., 108 F.2d 470, at p. 473.

Practice discontinued "shortly before" the complaint was issued. *Hershey Chocolate Corporation v. Federal Trade Commission,* 3 Cir., 121 F.2d 968.

No discontinuance prior to filing of the complaint. *Perma-Maid Co. v. Federal Trade Commission,* 6 Cir., 121 F.2d 282.

Nor do the facts appear in *Philip R. Park v. Federal Trade Commission,* 9 Cir., 136 F.2d 428.

Practices discontinued (withdrawal from the Association) one year *after* the complaint was filed. *Eugene Dietzgen Co. v. Federal Trade Commission,* 7 Cir., 142 F.2d 321.

The expression in the following case is dictum only. *Corn Products Refining Co. v. Federal Trade Com-*

mission, 7 Cir., 144 F.2d 211 (Point not mentioned in affirming opinion. 324 U.S. 726).

Circumstances of discontinuance not shown. *Gelb v. Federal Trade Commission,* 2 Cir., 144 F.2d 580.

Again, in the following case it will be noted that only part of the practices had been discontinued.

> "* * * Finally, the fact that use of the 'club plan' was abandoned more than a year before the Commission issued its complaint is not a bar to an order to cease and desist, for the Commission has broad discretion to determine whether such an order is needed to prevent resumption of the practice. *Gelb v. Federal Trade Commission,* 2 Cir., 144 F.2d 580, 581; *Bunte Brothers v. Federal Trade Commission,* 104 F.2d 996, 997; cf. *Federal Trade Commission v. Civil Service T. Bureau,* 6 Cir., 79 F.2d 113; 115. We cannot say there was no reason to apprehend its renewal, for the petitioners were still continuing the analogous unfair practice of supplying bingo paraphernalia." *Deer v. Federal Trade Commission,* 2 Cir., 152 F.2d 65, at p. 66.
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> "Denison and Reyburn place great reliance upon their withdrawal from the Association long before the Federal Trade Commission's investigation even began. Such withdrawal, while of some persuasive import, does not negative the continued adherence to all the trade practices and zone system theretofore in existence, which resulted in substantially identical delivered prices. We do not feel theirs are cases of such good faith cessation of illegal activities as denies the Commission of the power to issue a cease and desist order." *Fort Howard Paper Co. v. Federal Trade Commission,* 7 Cir., 156 F.2d 899, at pp. 907-8.

In the following case the illegal acts were accomplished through licensing agreements. These license agreements had been voluntarily abandoned by all but one of the respondents prior to filing of the complaint, but how long before does not appear.

> "It was not error for the Commission to issue the cease and desist order even though the licenses were cancelled by all but one of the petitioners prior to the institution of the action. The Commission is invested with a wide discretion in determining whether or not the practices forbidden will be resumed. *Arkansas Wholesale Grocers' Ass'n. v. Federal Trade Commission,* 8 Cir., 18 F.2d 866, certiorari denied 275 U.S. 533, 48 S. Ct. 30, 72 L. Ed. 411; *Vaughan v. John C. Winston Co.,* 10 Cir., 83 F. 2d 370, 376." *Keasbey & Mattison Co. v. Federal Trade Commission,* 6 Cir., 159 F.2d 940, at p. 951.
>
> "Though they have discontinued their unlawful practices *in part,* that did not deprive the Commission of power to make such order as it determined necessary to prevent their revival. *Federal Trade Commission v. Goodyear Tire & Rubber Co.,* 304 U.S. 257, 58 S. Ct. 863, 82 L.Ed. 1326; *National Silver Co. v. Federal Trade Commission,* 2 Cir., 88 F.2d 425; *Educators Association v. Federal Trade Commission,* 2 Cir., 108 F.2d 470. What order is necessary to enforce the statute fairly and adequately, after findings of particular violations have been made, is a matter as to which the judgment of the Commission is controlling unless its discretion has been clearly abused. *Herzfeld v. Federal Trade Commission,* 2 Cir., 140 F.2d 207. No abuse has been shown." *Hillman Periodicals v. Federal Trade Commission,* 2 Cir., 174 F. 2d 122, at p. 123. (Italics supplied)

UNITED STATES SUPREME COURT CASES

The only case involving this point in connection with Federal Trade Commission proceedings is *Federal Trade Commission v. Goodyear Tire & Rubber Co.,* 304 U.S. 257, 58 S. Ct. 863, 82 L.ed. 1326.

The charge was violation of the Clayton Act in giving quantity discounts on sales of tires to Sears Roebuck. The Commission issued its cease and desist order, which under the Clayton Act, did not become final until review by the Circuit Court of Appeals. Pending the hearing in that court, Congress amended Section 2 of the Clayton Act in regard to quantity differentials. Respondent then informed the Circuit Court that in view of this amendment, it had ceased to manufacture tires for Sears Roebuck under the existing contract; that a new price arrangement had been made to conform to the new law to dispose of existing stocks, and that within the year all transactions between the parties had terminated.

The Circuit Court, deeming the case moot, remanded the case to the Commission with directions to dismiss the complaint but without prejudice to filing a supplemental complaint under the Clayton Act as amended.

Both the Commission and the respondent contended that the case was not moot, and wished it determined on the merits.

> "Discontinuance of the practice which the Commission found to constitute a violation of the Act did not render the controversy moot. *United States v. Trans-Missouri Freight Assn.,* 166 U.S. 290, 309, 310; *Southern Pacific Co. v. Interstate Commerce Commission,* 219 U.S. 433, 452; *Southern Pacific*

Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 514-516; *National Labor Relations Board v. Pennsylvania Greyhound Lines,* 303 U.S. 261; *Guarantee Veterinary Co. v. Federal Trade Commission,* 285 Fed. 853, 859, 860; *Chamber of Commerce v. Federal Trade Commission,* 13 F.2d 673, 686, 687. The Commission, reciting its findings and the conclusion that respondent had violated the Act, required respondent to cease and desist from the particular discriminations which the order described. That is a continuing order. Its efficacy, if valid, was not affected by the subsequent passage or the provisions of the amendatory Act. As a continuing order, the Commission may take proceedings for its enforcement if it is disobeyed. But under the statute respondent was entitled to seek review of the order and to have it set aside if found to be invalid. The question which both parties sought to have the Circuit Court of Appeals decide was whether respondent's conduct was a violation of the original statute. Upon the conclusion that it was such a violation, the Commission based its order. Neither the transactions subsequent to that order nor the passage of the amendatory Act deprived the respondent of its right to challenge the order and to have its validity determined, or the Commission of its right to have its order maintained if validly made." (p. 260)

ANALYSIS OF CASES CITED IN THE FOREGOING OPINION

U.S. v. Trans-Missouri Freight Ass'n., 166 U.S. 290, 17 S. Ct. 540, 41 L. Ed. 1007.

The government brought an action under the Sherman Act to dissolve the freight association and to enjoin the railroad companies from any further conspiring, etc. The complaint was filed January 6, 1892. On November 19, 1892, the association was dissolved, and a motion was made to dismiss this appeal. However, another association was set up immediately, apparently along similar lines.

The Court in rejecting this contention points out that the government was seeking more than the dissolution of the association. The Court goes on to say:

> " * * * If the mere dissolution of the association worked an abatement of the suit as to all the defendants, as is the claim made on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow. Although the general rule is that equity does not interfere simply to restrain a possible future violation of law, yet where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law and the jurisdiction of the court has attached

by the filing of a bill to restrain such or any like action under a similar agreement, and a trial has been had, and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit." (page 309)

" * * * It is claimed at bar that the questions arising for decision are moot, since in consequence of the lapse of more than two years since the order of the Commission became effective, by operation of law the order of the Commission has spent its force, and therefore the question for decision is moot. The contention is disposed of by *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* this day decided, *post* p. 498. In addition to the considerations expressed in that case it is to be observed that clearly the suggestion is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy." *Southern Pacific Company v. Interstate Commerce Commission,* 219 U.S 433, at p. 452, 31 S. Ct. 288, 55 L. ed. 283.

"It will be observed that the order of the Commission required appellants to cease and desist from granting Young the alleged undue preference for a period of not less than two years from September 1, 1908 (subsequently extended to November 15). It is hence contended that the order of the Commission has expired and that the case having

thereby become moot, the appeal should be dismissed."

* * * * * * * *

"In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress." *Southern Pacific Terminal Company v. Interstate Commerce Commission and Young,* 219 U.S. 498 at pp. 514, 515, 31 S. Ct. 279, 55 L. ed. 310.

"Respondents suggest that the case has become moot by reason of the fact that since the board made its order it has certified the Brotherhood of Railroad Trainmen as representative of the motorbus drivers of the Pennsylvania company for purposes of collective bargaining and that in a pending proceeding under § 9(c) for the certification of a representative of the other Pittsburgh employees, to which the Employees' Association is not a party, the Pennsylvania company and Local Division No. 1063, who are parties, have made no objection to the proposed certification. But an order of the character made by the board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., et al., 303 U.S. 261, at p. 271, 58 S. Ct. 571, 82 L. ed. 831.

The other two cases cited, *i. e.,* the *Federal Trade Commission* cases, have previously been referred to.